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IN THE

Supreme Court of the United States

October Term, 1968
No. 356

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, LONG BEACH LOCAL No. 1-128,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and MacMILLAN RING-FREE OIL COMPANY, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION.

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BRIEF IN OPPOSITION.

Respondent MacMillan Ring-Free Oil Co., Inc. accepts Petitioner's reference to the reports of the case below, the jurisdictional statement, and citation of statutes involved.

Question Presented.

Whether the Court of Appeals correctly set aside the Board's finding that the Respondent failed to bargain in good faith where there was no reasonably substantial or significant evidence occurring within the six month period preceding the filing of the charge upon which to support such a finding and where the only substantial evidence to support the finding was drawn from events, occurring as much as three years prior to the filing of the charge.

Statement of the Case.

The following is a limited statement of facts. Because of the restrictive nature of the question presented to this Court, it is not necessary to belabor the facts in the voluminous record or to set forth the other defenses unrelated to Section 10(b) of the Act asserted by the Respondent before the Court of Appeals and which that Court found unnecessary to pass upon in making its decision.[1]

Without explanation or amplification the Board adopted the discursive decision of the Trial Examiner. It is apparent from the Trial Examiner's decision, although he gave lip service to the express requirements of Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b) that the finding that the Company failed to bargain in good faith was based entirely upon events and negotiations occurring more than six months before the filing of the charge. Many of the acts relied upon by the Trial Examiner occurred as much as three years prior to the filing of the charge.

The charge was filed on November 10, 1964, and therefore Section 10(b) prohibits the finding of any unfair labor practice based upon events which occurred prior to May 10, 1964.

An examination of the few events, proposals and conversations which were considered by the Trial Examiner and which occurred during this six month period were totally insufficient to sustain a finding that the Company violated its bargaining duty.

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[1]Respondent does not, however, concur in the argumentative Statement of the Case set forth in the Petition.

First, the Trial Examiner found that the parties had agreed at the meeting of May 7, 1964 to postpone negotiations during the pendency of industry-wide negotiations in order to allow the industry to reach a settlement that could be used by the parties to measure their bargaining proposals with regard to the economic provisions of any new collective agreement [App. 42].[2] Since this agreement occurred before the six month limitation period, then admittedly as of May 10, 1964, the parties having agreed not to negotiate, the Company could not have been in violation of its bargaining duty.

The first event occurring during the six month limitation period was a telephone conversation between the parties' negotiators during the first part of August, 1964 [App. 43]. There is absolutely no evidence of any act, proposal, negotiation, conversation, discussion, refusal to meet, or other evidence during the six month limitation period prior to this telephone conversation.

The Trial Examiner states that "the only matter of any substance in issue [referring to the details of the first August telephone conversation] is whether Mr. Cody or Mr. Becker initiated the first call in August . . ." [App. 44]. Both Mr. Cody, the Union's negotiator, and Mr. Becker, the Company's negotiator, claimed to have initiated the first telephone conversation which occurred in the first part of August [App. 43]. However, despite the fact that the Trial Examiner found

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[2]"Tr." refers to the reproduced portions of stenographic transcript of the unfair labor practice hearing which together with "Volume 1, Pleadings" comprised the record in the Court of Appeals and certified copies thereof have been filed with the Petition. "App." refers to the appendix to the Petition for Certiorari.

that Mr. Cody initiated the first telephone conversation [App. 43], there is certainly no substance in such a finding upon which to base a determination that the Respondent refused to bargain [App. 43]. According to their prior agreement, there was no immediate compulsion upon either party to begin bargaining, and a determination whether or not Mr. Cody did in fact initiate the first telephone conversation in August constitutes not a scintilla of evidence to support a determination that Company had violated its bargaining duty.

Thereafter, Mr. Becker, according to Mr. Cody's own testimony, did call Mr. Cody to arrange the negotiating session of September 2, 1964 [App. 43]. Certainly the Trial Examiner did not base his finding that the Company had violated the Act upon Mr. Becker's initiation of a bargaining session by his telephoning Mr. Cody sometime around the middle of August.

Thus, from May 10 until the first part of September, 1964, there was no action taken by either of the parties upon which the Trial Examiner would be correct in attempting to utilize evidence of acts occurring prior to May 10, 1964, to shed light upon that action's true character.

The parties met on September 2, 1964, and the Trial Examiner did find that on that date Mr. Becker made an offer to the Union of either a pension plan or a 4½% wage increase and did present to the Union a written contract proposal [App. 46]. It is true, as noted by the Trial Examiner, that the Union rejected the Company's offer of September 2, 1964 [App. 47]. However, there is not a scintilla of evidence in the record concerning the meeting of September 2, 1964

which establishes that the Company was either attempting to undercut the Union or was bargaining in bad faith.

The parties met again on September 4, 1964 under the auspices of the Federal Mediation and Conciliation Service. Inasmuch as the Trial Examiner found that the parties were principally concerned at that meeting with a determination of whether or not the Company had in fact made a wage offer of 4½% on September 2, 1964 and because the Trial Examiner found that the Company had made such a wage offer [App. 50], nothing that occurred at that meeting demonstrates that the Company was refusing to bargain.[3]

The Trial Examiner summarized the positions of the parties as of September 4, 1964:

> "As of that point, the divisions between the parties consisted, basically, of the differences between the types of pension plans they had respectively proposed, and between the Union's contract proposal of September 19, 1962, the terms of which, putting aside its wage schedule and a relatively few minor changes, were virtually identical with those of the 1960 contract, and the Company's contract proposal of September 2, 1964, which, as previously indicated, was little different from the Company's proposal of October 8, 1962." [App. 51-52; R. 36, lines 39-46].

The negotiating session of September 4, 1964, was the last meeting held by the parties prior to the strike.

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[3]The Union denied the wage increase offer had been made on September 2, 1964. But as found by the Trial Examiner, the substantial wage offer had been made by the Company prior to the strike [App. 50-51].

The only other event occurring within the limitation period considered by the Trial Examiner was the letter of September 3, 1964 mailed by the Company to its employees. The Trial Examiner expressly held that the record would not sustain a conclusion that the relevant statements in the Company's letter of September 3, 1964, "amount either to manifestations of bad faith in bargaining or any abridgement of the rights guaranteed employees by Section 7 of the Act." [App. 51]. Therefore, the letter of September 3, 1964 was not a basis for a determination that the Company had refused to bargain prior to September 8, 1964.

In order to realize the exceptional facts of the instant case and the clearly erroneous determination of the Trial Examiner and the Board, all of the events occurring during the six-month limitation period prior to the strike of September 8, 1964, as of which time the Trial Examiner concluded the Company was derelict in its bargaining duty, are set forth below in schedule form.

May 7, 1964 Agreement of parties not to meet until Industry Settlement final.

May 10, 1964 (*Inception of six-month limitation period*)

August (?) 1964 Becker-Cody telephone conversation *re* industry settlement.

August (?) 1964 Becker calls Cody to arrange meeting of September 2, 1964.

Sept. 2, 1964 Parties meet, Company offers 4½% wage increase or pension plan and submits written proposal.

Sept. 3, 1964 Company mails letter to employees (*expressly found to be no evidence of bad faith*).

Sept. 4, 1964 Negotiating session mainly to determine whether Company made wage offer of 4-½%.

Sept. 8, 1964 Strike (*Date as of which Trial Examiner found company had refused to bargain*).

Section 10(b) has been held by this Court to be a statute of limitation and not an evidentiary rule. As such, it was not waived by the Company which continually raised the objection that its rights under Section 10(b) were being violated by the Trial Examiner's allowing the wholesale introduction of evidence antedating the six-month limitation period. The Trial Examiner attempted to sustain his determination that the Company had violated its bargaining duty prior to September 8, 1964 by the bald assertion that the role of events antedating the limitation period was merely to shed light on events occurring within the period. However, as the above discussion reveals, *there was absolutely no evidence of any happenings during the limitation period of such a character that the evidence of events prior to May 10, 1964, could legitimately be utilized by the Trial Examiner.*

Was the Trial Examiner's determination based upon a finding that the Company did not demonstrate due diligence in attending negotiating sessions? In his opinion he refers to evidence antedating the six-month limitation period as demonstrating the "foot dragging" tendencies of Company. However, as the parties had agreed on May 7, 1964 not to meet until a certain time, and when that time was reached the parties did in fact meet, there is not a scintilla of evidence within the relevant period upon which to conclude that

Company was engaging in "foot dragging" or dilatory maneuvers. Similarly, inasmuch as the Company did in fact meet, did present a proposal with substantial increased economic benefits, and demonstrated a desire to reach an agreement, there is no evidence within that period that it refused to bargain in good faith. The only conclusion which may be reached from the events occurring during the limitation period is that *neither* party had retreated from its position taken three years prior on the non-economic items.[4]

The Court of Appeals, in its decision denying enforcement of the pertinent part of the Board's order, recognized that it was uncontradicted that the Company did very little between May 10 and September 8, 1964 which could conceivably constitute a refusal to bargain [App. 4].[5] The Court also noted that throughout the entire course of the negotiations the "union likewise remained adamant, refusing to retreat to any substantial extent from its original proposals on most issues [App. 5; fn. 4]. The Court of Appeals then held:

> "[W]e think that to allow the Board to find a violation where the only substantial evidence supporting that finding is drawn from events occurring prior to the allowable six-month period would violate the section's clear purpose

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[4]The Company had agreed with the Union and put into effect a 5% wage increase in January, 1963, and as of September 2, 1964, was proposing a 4½% increase. [App. 38-39, 45-46].

[5]Although the Board expressly found that the Company's actions subsequent to September 8, 1964 were proper and did not constitute support for a finding of a violation of the Act, the Court of Appeals correctly noted that because the strike commencing on September 8, 1964 was found to be the result of a refusal to bargain, the Board's opinion on that question must be sustained by substantial evidence prior to that date. [App. 3-4].

> ' "to bar litigation over past events after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused," . . .'
>
> * * * *
>
> "To recapitulate, then, we hold that while evidence of events occurring more than six months before the filing of a charge may be used to 'shed light' upon events taking place within the six-month period, the evidence of a violation drawn from within that period must be reasonably substantial in its own right. * * * Thus the Board's conclusion that MacMillan improperly refused to bargain with the union during the applicable limitations period cannot be upheld." [App. 13-14].

The Court of Appeals held that the events occurring during the 10(b) period were plainly insufficient to support the Board's finding of a refusal to bargain [App. 4].[6]

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[6]The assertions in the Petition that the Court below found that the unfair labor practice admittedly occurred within the six-month period (Pet. 22) and that the Court below acknowledged that the violation "occurred" during the six month period (Pet. 16) are misleading and without basis in the Court's decision. To the contrary, the Court specifically held that no such violation occurred during the 10(b) period. Petitioner is obviously relying upon phrases taken out of context from the Court's statement that:

> "Section 10(b) has been characterized as 'a statute of limitations, and not a rule of evidence.' *Local 1421, IAM v. NLRB*, 362 U.S. 411, 415 (1960). And *literally*, of course, the violation found by the Board 'occurred' within the specific six-month period before the filing of the charge." [Emphasis added].

Reasons Why Writ Should Not Be Granted.

1. Certiorari should not be granted because this case involves only a determination of fact decided under the rule established in *Local 1424, International Association of Machinists v. N.L.R.B.*, 362 U.S. 411 (1960). Although Petitioner contends that the Court of Appeals relied upon an incorrect principle of law, as noted in the Memorandum for The National Labor Relations Board in Opposition, the Court of Appeals merely had to determine that "delicate line, which necessarily turns on the facts of the particular case." (p. 3).

2. Although the Court of Appeals did characterize its decision as determining a question not before this Court in *Local 1424, Int'l Ass'n of Machinists v. N.L.R.B.*, 362 U.S. 411 (1960), Respondent submits the Court's decision is directly in accord with the case. As in the *Machinists* case the Court of Appeals held that evidence antedating the limitations period could be utilized to shed light on more recent events. By holding that evidence of a violation drawn from within the period must be reasonably substantial or significant, the decision is in full accord with the principle noted with approval by this Court in the *Machinists* case that "acts within the limitations period must under Board doctrine yield some substantial evidence of unlawful conduct." 362 U.S. 411, 422 fn. 13.

The decision of the Court of Appeals is also in accord with the Congressional intent underlying Section

10(b), approved and enforced by this Court in the *Machinists* case that Section 10(b) constitutes a bar to litigation over past events "after records have been destroyed, witnesses have gone elsewhere, and recollection of events in question have become dim and confused, H.R. Rep. No. 245, 80th Cong., 1st Sess. p. 40 and of course to stabilize existing bargaining relationships." 362 U.S. 411, 419.[7]

3. The decision of the Court below is not in conflict directly or even indirectly, with the decisions of other courts of appeals. The decisions in *Sheet Metal*

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[7] In *Machinists* this Court stated:

> "The Examiner's Report shows the pertinency of this statutory purpose in the present case. In his analysis of the evidence, he observed:
> "'It is evident that with many witnesses testifying as to numerous different matters, it would protract this report greatly to summarize all of the testimony, or to spell out fully the confusion and inconsistencies therein, much of which is not too surprising, in view of the fact that, with respect to the events of August 1954 [the events "at the core" of the allegations of illegality], there had been a lapse of almost 15 months before testimony was given in November 1955.' 119 N.L.R.B., at 529."

The Trial Examiner in the instant case similarly observed:

> "As may be expected with so many meetings over so long a period, the record of the negotiations is voluminous, each side giving its version of many matters, with attendant differences in emphasis and detail. Understandably, I omit various details that, in my view, cannot possibly affect the results and would, by review here, only add encumbrance to an already heavily burdened record, although I include other details of no particular significance to facilitate conversion of a complex, and at times confusing, record into a narrative account connecting and setting forth the findings and conclusions on the material issues."

In *Machinists* there was a lapse of only 15 months before the testimony was given. In this case, there was a lapse of as much as three and four years before testimony was given concerning facts the Trial Examiner found significant.

Workers' Int'l Ass'n v. N.L.R.B., 293 F. 2d 141 (D.C. Cir. 1961), cert: denied, 368 U.S. 896 (1961), *International Union, United Automobile Workers v. N.L.R.B.*, 363 F. 2d 702 (D.C. Cir. 1966), cert. denied, 385 U.S. 973 (1966) involved and in effect held that where there has been significant active conduct during the limitations period, events prior to the six-month period may be utilized to shed light on that conduct. The implied holding in both the *Sheet Metal Workers* case and the *Automobile Workers* case, and the express holding in the instant case was that if no significant or substantial acts occurred during the limitations period, any finding of a violation by the Board must of necessity be based solely upon events preceding the limitations period. In both the *Sheet Metal Workers* case and the *Automobile Workers* case, substantial and significant events or acts did occur during the limitations period.

4. As noted by the Memorandum of the National Labor Relations Board in Opposition, the Board in this case did not articulate any theory concerning the application of Section 10(b) to the facts of the case.

The other decisions cited by the Petition dealing with the specific and unique question of determining when a charge is timely which alleges an unlawful refusal to reinstate unfair labor practice strikers are completely irrelevant to the decision of the Court below. The question of a timely 8(a)(3) charge was not put in issue by the charge in the instant case nor presented to the Trial Examiner, the Board or the Court of Appeals.

Conclusion.

Wherefore, Respondent respectfully submits that this Court should deny the Petition for Certiorari.

Respectfully submitted,

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